NO. 43216-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MOYLE
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George Wood, Judge

BRIEF OF APPELLANT

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STATUTES, RULES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The state failed to prove all essential elements of the crime of vehicular assault/ assault of a child/ person.

2. Appellant was denied jury unanimity where the state charged Mr. Moyle by alternate means but failed to request a jury unanimity instruction.

3. Appellant was denied a fair trial where the jury instructions were confusing and led the jurors to believe that they need not be unanimous as to the means by which Mr. Moyle committed the alleged assaults.

Issues Presented on Appeal

1. Did the state fail to prove all essential elements of the crime of vehicular assault/ assault of a child/ person?

2. Was Appellant denied jury unanimity where the state charged Mr. Moyle by alternate means but failed to request a jury unanimity instruction?

3. Did the jury instructions confuse the jurors to believe that they need not be unanimous as to the means by which Mr. Moyle committed the alleged assaults?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Michael Moyle was charged with multiple counts of assault: vehicular assault, assault of a child in the first and second degree and assault in the second degree. CP 212, 221, 249. Mr. Moyle raised a diminished capacity defense. CP 232. Following a jury trial, Judge George Wood presiding, Mr. Moyle was convicted of two counts of assault in the second degree with a deadly weapon, assault in the second degree with a deadly weapon, and felony hit and run.1 CP 18, 114-122. Mr. Moyle was sentenced within the standard range. CP 18. This timely appeal follows. CP 13.

1. SUBSTANTIVE FACTS

Mr. Moyle was assaulted with a knife held to his face on April 10, 2011 while sitting in his car in his driveway. RP 9-10 (January 26, 2012). The incident scared him to the point of having flashbacks and believing that the person driving the getaway car with his attacker was the same person driving a red Subaru on April 13, 2011, two days later, in the Albertson's parking lot. RP 6, 8-11, 15-16 (January 26, 2012). When Mr. Moyle saw the driver's face grinning at him, he thought he saw the assailant's driver's face and "freaked" and could not remember much else. RP 15-16 (January 26, 2012).

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1 Mr. Moyle was also convicted of vehicular assault and those charges were dismissed

When Mr. Moyle saw the driver of the red Subaru and believed it was his attacker he "snapped". RP 14. Mr. Moyle remembered turning his car around and running into the back of the red car and seeing car seats flying but he could not remember if he intentionally collided with the red Subaru. RP 6-7, 13 (January 26, 2012).

Michael Hassell was in the Albertson's parking lot taking a break, reading, on April 13, 2011 when he heard a noise and saw a red car exit the parking lot while a black car completed a turn-around to follow the red car out of the lot. RP 10 (January 24, 2101). Mr. Moyle was driving a black Mustang the day of the incident. RP 8 (January 26, 2012). Grady Longacre a meat cutter at Albertson's, also on a break, saw a Black Mustang spin around to follow red car out the parking lot. RP 15, 17, 18.

William Kirkman saw a black car travelling fast on Laurel Street. RP 22 (January 24, 2011). When Kirkman came to the crest of the hill he heard a crash and saw dust. He called 911 and watched a black car continue to travel while a red car was crashed into a telephone pole. RP 22 (January 26, 2012). Kirkman did not witness the accident. RP 23 (January 26, 2012).

Ted Wanner, a retired school bus driver was delivering kindergarten children in his bus on April 13, 2011 when he saw two cars side by side

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after trial on double jeopardy grounds. RP 7-8 (March 15, 2012 Sentencing hearing).

speeding on Laurel. The red car passed the black car and cut off the black car. RP 30-31-36-37 (January 24, 2011). As the red car cut off the black car, the red car swung back sharply, lost control and drifted about 40 feet into a telephone pole. RP 37-38(January 24, 2011). Mr. Wanner did not observe any contact between the red and black car. RP 39 (January 24, 2011).

While the red car struck the telephone pole, the black car drove approximately 100 yards further down the road. RP 29 (January 24, 2011). Marcus Pacheco was working in the area observed the red car crashed into the telephone pole. Mr. Pacheco stopped and helped pry open the driver's door of the car and removed a crying child. RP 41 (January 24, 2011).

Tawny Baker was a passenger in the red car along with her son Stewart Baker the driver, her son Aaron and her granddaughter Lavender. RP 51, 55. (January 24, 2012). According to Ms. Baker, Mr. Baker exited the Albertson's parking lot and drove into Laurel Street when a black car seemed to be following him. RP 52 (January 24, 2012). At a stop sign Mr. Baker looked at Mr. Moyle and believed Mr. Moyle to be angry. Mr. Baker sped in his own car and his mother Ms. Baker told him to slow down. RP 52, 65 (January 24, 2012). During the speeding, the black car hit the red car and the red car sailed into a telephone pole. Ms. Baker suffered broken arms, and Aaron broke a leg and sustained a head injury. RP 52-53. (January 24,

2011). RP 7-12 (January 25, 2011). Ms. Baker continues to suffer pain from her injuries. RP 54-55 (January 24, 2012). Neither Mr. Baker nor his daughter suffered injuries other than a sprained shoulder for Mr. Baker and a small cut on Mr. Baker's daughter. RP 73 (January 24, 2012).

David Killeen, a former Washington State Patrol accident reconstruction expert testified that based on his examination of the scene of the accident sometime in June 2011, he determined that prior to the collision the red Subaru cut in front of Black Mustang which was going straight. The Mustang applied breaks to avoid hitting the Subaru and slid 102 feet then coasted another 702 feet past the collision. RP 127-128 (January 24, 2011). The Subaru cut in front of the black car, overcorrected and went into a spin called a "critical speed scuff mark". The Subaru rotated clockwise and hit a power pole. RP 129 (January 24, 2011). At some point the Mustang hit the red car in middle of its back end, possibly when the Subaru cut off the Mustang. RP 127-140 (January 24, 2011).

Mr. Moyle left the scene because he was afraid and realized that there was nothing he could do to assist the injured. He was cooperative when the police took him into custody. RP 34, 50 (January 25, 2011; RP 8-9 (January 26, 2011). Mr. Moyle did not remember what happened during the incident other than he saw Mr. Baker's face, believed it to be his attacker's driver and

snapped. RP 6, 9. (January 26, 2011).

Diminished Capacity

Doctor Richard Nevotti testified as a defense expert on diminished capacity and administered of a number of tests. Dr. Nevotti determined that Mr. Moyle was suffering from Acute Stress Disorder (ASD) when he committed the assaults in this case. RP 66-83. (January 25, 2011). Dr. Nevotti explained that Mr. Moyle described being assaulted three days before this incident and that from the assault incident, Mr. Moyle was in a state of acute stress, similar to post traumatic stress disorder (PTSD) and did not have the capacity to form the intent to commit the assaults in this case. RP 79-83, 103. (January 25, 2011).

Dr. Nevotti explained that unlike PTSD, ASD only lasts between two days to four weeks, whereas PTSD generally can last from months to years. RP 77 (January 25, 2011). Dr. Nevotti interviewed Mr. Moyle within two months of the incident whereas the state's psychologist interviewed Mr. Moyle seven months after the incident. RP 66-67, 138 (January 25, 2011).

Joelene Simpson, a Western State psychologist hired by the state to evaluate Mr. Moyle, did not administer any tests. Rather she met with Mr. Moyle for two hours and conducted an interview. RP 30, 32. (January 25, 2011). Dr. Simpson agreed with Dr. Nevotti that Mr. Moyle did not

demonstrate any signs that he fabricated or exaggerated his experience and resulting stress from being attacked. RP 38, 69, (January 25, 2011). Nonetheless, Dr. Simpson opined that seven months after the incident, Mr. Moyle did not present evidence to support that he could not have formed the intent to commit the assaults. RP 81 (January 25, 2011).

Closing Argument

Over multiple defense objections, during closing argument, the prosecutor misstated the law on the state's burden of proof by requiring the defense to create a "reasonable" story rather than requiring the state to prove each element beyond a reasonable doubt. RP 120-121.

> "I want you to consider basically whether it would be reasonable for you to believe the defense's [sic] theory because the standard is reasonable doubt". First let's look at --....
>
> It's my burden to prove to you each element of those charges beyond a reasonable doubt. So, I'm going to look first at the reasonableness of the defendant's story about what happened to him on April 10, 2011.

The defense renewed its objection which the trial court overruled. RP 120-121. During rebuttal the prosecutor continued to argue to the jury that it was not reasonable for the jury to believe the defense theory and that the defense theory did not amount to reasonable doubt. RP 124-125.

C. ARGUMENT

1. THE STATE FAILED TO PRESENT PROOF BEYOND A REASONABLE DOUBT THAT THE APPELLANT FORMED THE INTENT TO COMMITT ASSAULT.

The test for determining whether the evidence is sufficient to support a defendant's conviction is whether, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Kintz,* 169 Wn.2d 537, 551, 238 P.3d 470 (2010). In a challenge to the sufficiency of the evidence in a criminal case, the Court draws all reasonable inferences from the evidence in favor of the State. *Kintz,* 169 Wn.2d at 551. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Moyle was charged with multiple counts of vehicular assault and assault in the second degree. On double jeopardy grounds, the trial court dismissed the vehicular assault charges. CP 18. Assault of a child in the second degree in Jury instruction # 12 stated that assault is committed when someone "intentionally assaults another and thereby recklessly inflicts substantial harm". CP 138. The to-convict instructions 14 and 15 for the children A.B. and L.B., listed the element of assault as "assault in the second

degree". CP 140-141. The to-convict assault instruction # 16 involving the adult T.B. listed the elements of "intentionally assaulted. TB." or "assaulted T.B. with a deadly weapon". CP 142. The to–convict instruction involving S.B. only listed assault with a deadly weapon. CP 143.

All of the assault charges required the state to prove intent to assault. *State v. Elmi,* 166 Wn.2d 209, 215, 207 P.3d 439 (2009); *State v. Abuan*, 161 Wn.2d 135, 156, 158, 257 P.3d 1 (2011); *State v. Byrd,* 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995); RCW 9A.36.021(1)(a), (c). Both of the assault of a child charges and the assault against T.B. charge required the state to prove Mr. Moyle intentionally assaulted another and thereby recklessly caused "substantial bodily harm". The assault with a deadly weapon against T.B. and S.B, only required an intent to cause fear. *State v. McKague*, 170 Wn.2d 802, 805- 806, 262 P.3d 1225 (2011); *Abuan*, 161 Wn.2d at 156, 158-159.

Substantial bodily harm" means a bodily injury involving a temporary but substantial disfigurement, a temporary but substantial loss or impairment of the function of any body part or organ, or a fracture of any body part. RCW 9A.04.110(4)(b). *State v. McKague*, 170 Wn.2d 802, 805- 806, 262 P.3d 1225 (2011). To prove substantial bodily harm the state was required to prove beyond a reasonable doubt that L.B. suffered "temporary but substantial disfigurement or "substantial loss or impairment of the function of any bodily

part or organ". *McKague*, 170 Wn.2d at 806; CP 146.

In *McKague*, the Court held the evidence sufficient to establish substantial bodily injury where McKague punched Chang in the head several times and pushed him to the ground, causing Chang's head to strike the pavement and where Chang suffered bruising, lacerations and swelling lasting several days. *McKague*, 170 Wn.2d at 807.

While the Court in *McKague* held that the evidence of impairment to Chang's arm and shoulder caused by pain was sufficient to support a finding of substantial bodily harm. Id. The Court explained that "[p]ain, by itself, no longer constitutes substantial bodily harm." Id, citing, RCW 9A.04.110(4)(b); *cf.* former RCW 9A.04.110(4)(b) (1988).

L.B. Count III

Dr. Bradley Brown testified that he treated L.B. in the emergency room and the she only suffered minor bruises and scrapes. RP 10 (January 25, 2012). This does not support a finding of substantial bodily harm. RP 10. (January 25, 2012). L.B.'s injuries like the minor injuries in *McKague* were insufficient to constitute substantial bodily harm. For this reason, the conviction involving L.B. must be reversed and remanded with dismissal with prejudice.

Diminished Capacity S.B., A.B. , T.B. Counts I, II, IV.

The charges involving L.B., A.B, S.B. and T.B. required the state to prove intentional assault, that is specific intent to either cause fear with a deadly weapon , or by intending to and causing substantial bodily harm. *Elmi,* 166 Wn.2d at 215; *Abuan*, 161 Wn.2d at 156, 158; *Byrd,* 125 Wn.2d at 712-13; RCW 9A.36.021(1)(a), (c). CP 250. Because the term assault is not statutorily defined, Washington courts apply the common law definition to the crime. *Byrd,* 125 Wn.2d 707, 712. Specific intent is a required element of second degree assault. *Byrd,* 125 Wn.2d at 713.

When diminished capacity is raised as a defense it is treated as a rule of evidence that allows the defense to introduce evidence relevant to subjective states of mind. *State v. Marchi,* 158Wn. App. 823, 834, 243 P.3d 556 (2010). A diminished capacity jury instruction allows a jury to take evidence of diminished capacity into account when determining whether the defendant could form the requisite mental state. *Marchi,* 158Wn. App. at 834.

Mr. Moyle obtained a diminished capacity instruction because he presented substantial evidence of a mental illness or disorder and the evidence logically and reasonably connected Mr. Moyle's mental condition with the inability to form the mental state necessary to commit the charged crime. *State v. Cienfuegos,* 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *Marchi,* 158 Wn. App. at

834.). While Courts may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability, here, based on the presentation of evidence of diminished capacity, intent did not flow as a logical probability from Mr. Moyle's conduct. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The state failed to prove that Mr. Moyle was capable of forming the intent to cause substantial harm or the intent to cause fear because the evidence indicated that Mr. Moyle was in a state of disorientation, somewhat unaware of his actions and thus unable to formulate the intent. For these reasons, the charges of assault must be reversed and the charges dismissed with prejudice.

2. THE STATE WAS RELEIVED OF ITS BURDEN OF PROVING ALL ESSENTIAL ELEMENTS FO THE CRIMES CHARGED WHERE THE STATE OMITTEDTHE MENS REA AND ALTERNATE MEANS IN THE TO-CONVICT INSTRUCTIONS ON ASSAULT OF A CHILD IN THE SECOND DEGREE.

Mr. Moyle was charged with assault of a child by alternate means: intentional assault and assault with a deadly weapon. CP 212. In Mr. Moyle's case, the trial court's to-convict instructions on assault of a child (Jury instructions 14 and 15) did not include the alternate means set forth in the charging document but the charging document referred to the alternate means

set forth in RCW 9A.36.021(1) (a) and (c). Instruction 13 similarly, defined assault of a child as "assault in the second degree". CP 139. Instruction 12 however defined assault in the second degree as an intentional assault that thereby recklessly inflicts substantial bodily harm or with a deadly weapon. CP 138. Subsections (a) and (c) are the alternate means of committing assault I the second degree. RCW 9A.36.021(1) (a) and (c); *State v. Smith*, 159 Wn.2d 778, 790, 154 P.3d 873 (2007).

Due process is violated when jury instructions, read as a whole, do not correctly tell the jury of the applicable law, or are misleading. *State v. O'Hara,* 167 Wn.2d 91, 105, 217 P.3d 756 (2009); *State v. Campbell,* 163 Wn.App. 394, 400, 260 P.3d 235 (2011). The constitution "requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.' " *O'Hara,* 167 Wn.2d at 105 (citation omitted). In order for jury instructions to be sufficient, they must be "'readily understood and not misleading to the ordinary mind.' " *Campbell,* 163 Wn.App. at 400, quoting, *State v. Dana,* 73 Wn .2d 533, 537, 439 P.2d 403 (1968).

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Barnes,* 153 Wn.2d 378, 382, 103 P.3d

1219 (2005). "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." *State v. Hayward*, 152 Wn. App. 632, 642, 217 P.3d 354 (2009), quoting, *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). This Court analyzes a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Hayward*, 152 Wn. App. at 642; *Pirtle,* 127 Wn.2d at 656-57.

This Court reviews alleged errors of law in jury instructions de novo. *Hayward*, 152 Wn. App. at 641; *Barnes,* 153 Wn.2d at 382. Even though Mr. Moyle did not object to the jury instructions below, he may raise it for the first time on appeal because the claimed errors are of constitutional magnitude. RAP 2.5; *State v. Holznecht,* 157 Wn.App. 754, 760–62, 238 P. 3d 1233 (2010), *review denied,* 170 Wn.2d 1029, 249 P.3d 623 (2011).

a. To Convict Instructions

A jury instruction that "omits an element of the charged offense or misstates the law," requires reversal, when the error is not harmless. *Hayward* 152 Wn. app. at 646, quoting, *Thomas,* 150 Wn.2d 821, 844, 83 P.3d 970 (2004). "[A]n erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis."

Hayward 152 Wn. app. at 646, quoting, *Thomas,* 150 Wn.2d at 844, citing, *Neder v. United States,* 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In cases involving "omissions or misstatements of elements in jury instructions, 'the error is harmless if that element is supported by uncontroverted evidence.' " *Hayward* 152 Wn. app. at 647, quoting, *Thomas,* 150 Wn.2d at 845, quoting, *State v. Brown,* 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The Supreme Court has held on many occasions that jurors are not required to supply an omitted element by referring to other jury instructions. *State v. Smith,* 131 Wn. 2d 258, 930 P. 2d 917 (1997); *State v. Emmanuel,* 42 Wn.2d 799, 819, 259 P.2d 845 (1953). In *Emmanuel*, the Supreme Court held that a "to convict" instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. The court emphasized that an instruction purporting to list all of the elements of a crime must in fact do so. *Smith*, 131 Wn.2d at 263; *Emmanuel,* 42 Wn.2d at 819-20.

Mr. Moyle was charged by amended information under both RCW 9A.36.130(1)(a) and 9A.36.021(1)(c). CP 222. Assault of a child under RCW

9.36.130(1)(a) provides in relevant part as follows:

> (1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:
>
> (a) Commits the crime of assault in the second degree, as defined in **RCW 9A.36.021**, against a child;

(Emphasis added). Assault in the second degree is defined in relevant part under RCW 9A.36.021 as follows:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> ...
> (c) Assaults another with a deadly weapon; or

Id. The to-convict jury instructions on assault of a child did not set forth the alternate means charged of committing assault by either intent to cause bodily harm or with a deadly weapon and intent to cause fear. Rather the to-convict instructions provided in relevant part as follows:

> To convict the Defendant of the crime of ASSAULT OF A CHILD IN THE SECOND DEGREE as charged, in Count I [and V], each of the following elements must be proved beyond a reasonable doubt:
> (1) That on or about the 13th day of April 2011, the defendant committed the crime of ASSAULT OF A CHILD

IN THE SECOND DEGREE against A.B. [and L.B.]....

This instruction does not set forth the elements in RCW 9A.36.021. When the jury instructions are read as a whole, it is not possible for the jurors to divine the essential elements of the crime charged. Rather the jury had to guess at what was required to prove an assault by a deadly weapon and intending to cause fear or by intent to cause substantial bodily injury. *Smith*, 159 Wn.2d at 790. The jury instructions here effectively relieved the state of its burden of proving the essential element of intent in the two assault of a child charges.

In *Smith,* 131 Wn.2d 258, the defendant was charged with conspiracy to commit murder. The court instructed the jury that to convict Smith of criminal conspiracy it had to find that the defendant agreed with his co-conspirators " 'to engage in ... the performance of conduct constituting the crime of Conspiracy to Commit Murder in the First Degree.' " *Smith,* 131 Wn. 2d at 261 (emphasis omitted) (quoting instruction 13). The State conceded the instruction incorrectly asked the jury to find that Smith committed the crime of conspiracy to commit conspiracy to commit murder. *Smith,* 131 Wn. 2d at 262.

The court stated that an instruction which "purports to be a complete

statement of the law yet states the wrong crime as the underlying crime which the conspirators agreed to carry out" was constitutionally defective because it relieved the State of the burden of proving that Smith conspired to commit murder and the error was not cured by other definitional instructions. *Smith,* 131 Wn. 2d at 263. In *Smith*, the Supreme Court held that the defendant denied a fair trial because the jury was required to "guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved. " *Smith*, 131 Wn.2d at 263.

In Mr. Moyle's case the to-convict instructions on assault of a child (14 and 15) and the definitional instruction (13) do not contain the essential elements of the crime "(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm or...(c) Assaults another with a deadly weapon" RCW 9A.36.021. The instructions here are constitutionally defective because they purport to be a complete statement of the law, yet completely omit any reference to RCW 9A.36.021. *Smith,* 131 Wn.2d at 263. The omission of the mens rea relieved the state of proving an essential element: the means by which the assault was committed. As in S*mith,* this constitutes reversible error.

3. APPELLANT WAS DENIED JURY UNANIMITY WHERE THE JURY INSTRUCTIONS ON ASSAULT OF A

CHILD IN THE SECOND DEGREE AND ASSAULT IN THE SECOND DEGREE DID NOT REQUIRE THE JURY TO UNANIMOUSLY AGREE TO THE TWO ALTERNATE MEANS CHARGED.

The to-convict instructions for the assault in the second degree charges (Jury instructions 16 and 17) included the alternate means elements, but the court failed to provide a unanimity instruction. CP 140-143. In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens,* 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Workman,* 66 Wn. 292, 294-95, 119 P. 751 (1911). The failure to follow one of these options is error, violates the defendant's state constitutional right to a unanimous jury verdict and the United States constitutional right to a jury trial. *State v. Badda,* 63 Wn.2d 176, 182, 385 P.2d 859 (1963); Wash. Const. art. 1, § 22; U.S. Const. amend. 6.

Alternative means statutes generally state a single offense, using subsections to set forth more than one means by which the offense may be

committed. *Smith,* 159 Wn.2d at 784. Where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged unless substantial evidence supports each alternative means. *State v. Kitchen,* 110 Wn.2d 403, 410, 756 P.2d 105 (1988). When the state alleged that second degree assault was committed by more than one of the means listed in RCW 9A.36.021(1) the case became an alternative means case requiring sufficient evidence to support each of the alternative means presented to the jury or a unanimity instruction. *Smith*, 159 Wn.2d at 790.

In *Richardson,* the defendant was convicted of second degree assault under former RCW 9A.36.020(1) (1975)2. On appeal, the defendant argued that the trial court's instruction setting forth three alternative means of assault as delineated in subsections (b), (c), and (e) of the statute denied him his right to a unanimous jury verdict. This Court agreed that the jury instruction set forth alternative "modes" for committing the single crime of second degree assault. *Id.* at 304, 600 P.2d 696. However, this Court affirmed the conviction and determined that Richardson's right to a unanimous verdict was not compromised because "there [was] substantial evidence to support a conviction on each of the [three] alternative modes" submitted. *Id.* at 305, 600 P.2d 696.

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2 Replaced by RCW 9A.36.021

Here, as in *State v. Richardson,* 24 Wn.App. 302, 600 P.2d 696 (1979), cited by *Smith*, 159 Wn.2d at 790, the state charged Mr. Moyle by two alternate means listed in RCW 9A.36.021(1): subsections (a) and (c) but failed to provide the required unanimity instruction. *Smith*, 159 Wn.2d at 790; *State v. Nonog,* 145 Wn.App. 802, 806, 187 P.3d 335 (2008), *aff'd,* 169 Wn.2d 220, 237 P.3d 250 (2010).

In *Nonog*, The Court determined that the defendant was charged by alternate means and the jury instructions as a whole set out distinct means, however the prosecutor only presented evidence of one means such that there was no possibility the jury convicted on a means that was not supported by the evidence. *Nonog,* 145 Wn.App. at 812.

Here as in *Nonong* and *Richardson*, the jury was instructed on multiple means of committing assault but without a unanimity instruction and without the prosecutor limiting herself to arguing a single means. Here unlike *Richardson*, and *Nonong* there was insufficient evidence in Mr. Moyle's case to support each alternate means. For example there was no evidence that L.B. suffered injury, and there was no evidence that Mr. Moyle intended to cause fear or substantial bodily injury. RP 124-126. The facts in Mr. Moyle's case demonstrated that Mr. Moyle went into some sort of mindless state when he saw Mr. Baker, that he and Mr. Baker drove at speeds nearing 80 miles per

hour; that Mr. Baker cut off Mr. Moyle during this high speed chase, causing Mr. Moyle to slam on his brakes, perhaps in an attempt to avoid Mr. Baker, but resulting in a Mr. Moyle's car striking the rear of Mr. Baker's car. Thereafter, Mr. Baker attempted to "correct" his speeding and swerving and ended in a spin that landed his car against a telephone pole. RP 37-39.

These facts do not overwhelmingly establish an intentional act or the use of the car as a deadly weapon: both argued by the prosecutor. RP 101-102, 124-126. Mr. Moyle seemed to have applied his brakes in a defensive manner to avoid a collision-the result differed in part because Mr. Baker was speeding, tried to cut-off Mr. Moyle and Mr. Baker could not control his car after he over corrected.

Where, as here, the state presented different means of committing the crimes of assault in the second degree but failed to provide sufficient evidence and failed to provide a unanimity instruction, the error cannot be deemed harmless because the error violates the constitutional right to a unanimous jury verdict and the United States constitutional right to a jury trial, and *Badda,* 63 Wn.2d at 182; Const. art. 1, § 22; U.S. Const. amend. 6. And as stated earlier, "Constitutional error is presumed to be prejudicial" *Guloy,* 104 Wn.2d at 425; *Hayward* 152 Wn. App. at 647. Here the lack of uncontroverted evidence regarding the means by which the assaults were

committed is reversible error requiring reversal of the convictions and remand for a new trial.

4. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT BY SHIFITNG THE BURDEN OF PROOF.

The prosecutor shifted the burden of proof by arguing to the jury that it could find Mr. Moyle guilty because it was not reasonable to believe him. RP 120-121, 124-25. This was reversible prejudicial misconduct. *State v. Miles*, 139 Wn.App. 879, 890, 162 P.3d 1169 (2007). Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). When a prosecutor commits misconduct, she may deny the accused a fair trial. Id. at 518; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *Boehning*, 127 Wn. App. at 519. However, a prosecutor may not make

statements that are unsupported by the evidence. *State v. Ray*, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991). Moreover, a prosecutor who misstates the law of a case commits a serious irregularity that has the potential to mislead the jury. *State v. Davenport*, 757, 763, 675 P.2d 1213 (1984). For example, a prosecutor commits flagrant misconduct by shifting the burden of proof to the defendant during closing argument. *State v. Stenson,* 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), citing *State v. Hoffman,* 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991); *Miles*, 139 Wn.App. at 890; *State v. Fleming,* 83 Wn.App. 209, 213–14, 921 P.2d 1076 (1996); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006).

In *Miles*, after telling the jury it heard "mutually exclusive" versions of events, the prosecutor committed misconduct by arguing:

> What do I mean by that? To simplify it as much as possible, if one is true, the other cannot be, as I'm sure you all know. If the State's witnesses are correct, the defense witnesses could not be and vice versa . . . [I]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you . . . You are being asked to use your experience and your common sense to decide which version of events that you have heard over in this courtroom over the course of this trial is more credible.

Miles, 139 Wn. App. at 889. In *Miles*, the prosecutor argued that to acquit the defendant the jury had to believe Miles' testimony; this was incorrect. *Miles*, 139 Wn.App. at 890. The jury had only to entertain a reasonable doubt

as to the State's case. Id, citing, *State v. McKenzie,* 157 Wn.2d 44, 59, 134 P.3d 221 (2006), citing ,*State v. Copeland,* 130 Wn.2d 244, 291–92, 922 P.2d 1304 (1996). In *Miles*, this Court reversed the conviction for misconduct where the prosecutor argued to the jury " a false choice. *Miles*, 139 Wn.App. at 890. A correct statement of the state's burden of proof required the jury to understand that they need not believe Miles and Bell, to find that the state failed to make its case beyond a reasonable doubt. Id.

In general, prosecutorial misconduct compels reversal where there is a substantial likelihood it affected the verdict. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). But because prosecutorial burden shifting affects a constitutional right, reversal is required unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663, 671, 132 P.3d 1137 (2006). Under this standard, the reviewing court should reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. citing *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)); *see also State v. Rivers*, 96 Wn. App. 672, 676, 981 P.2d 16 (1999) ("The state's burden to prove harmless error is heavier the more egregious the conduct is.").

Here, just as in *Miles*, the prosecutor told the jury that it was not reasonable for the jury to believe the defense theory and that the defense

theory did not amount to reasonable doubt. RP 120-121, 124-125. The prosecutor here shifted the burden of proof from the correct standard which requires the state, not Mr. Moyle to prove its case beyond a reasonable doubt regardless of whether or not the jurors believed Mr. Moyle's testimony. The State's argument misinformed the jury that to acquit Mr. Moyle, it had to believe him. This is precisely the reversible misconduct in *Miles*. *Miles*, 139 Wn.App. at 890. "[A] jury does not necessarily need to resolve which, if any, of the witnesses is telling the truth in order to conclude that one version is more credible or accurate than another." *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995), s*uperseded on other grounds in State v. Evans*, 163 Wn.App. 635, 260 P.3d 934 (2011);*Miles*, 139 Wn.App. at 890. As in *Miles*, the jury did not need to believe *Miles*; all it needed to do was to entertain a reasonable doubt regarding any element of the State's case. *Miles,* 139 Wn. App. at 890; *Wright,* 76 Wn. App. at 825-26.

As in *Miles*, this Court should reverse Mr. Moyle's conviction and remand for a new trial for reversible prosecutorial misconduct.

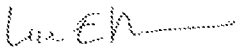
D. CONCLUSION

Michael Moyle respectfully requests this Court revers\e his convictions based on insufficient evidence and dismiss with prejudice. And in the alternative reverse and remand for a new trial with directions for jury

instructions that require jury unanimity and provide all essential elements in the to-convict instructions.

DATED this 9th day of October 2012.

Respectfully submitted,



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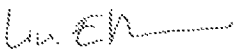

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